

48A C.J.S. Judges § 360

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

X. Special or Substitute Judges and Like Judicial Officers

B. Selection and Appointment of Special or Substitute Judges

2. Selection and Appointment Procedures of Special or Substitute Judges

§ 360. Special or substitute judge selected by agreement of parties

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#) 16(.5), 16(1)

Unless authorized by law, the litigants to an action have no right to select a special judge by agreement.

Party litigants have no authority to select special or like judges by agreement¹ unless such authority is conferred by law.² When the right of the parties to select the special judge is conferred by the constitution, it cannot be limited by statute.³ When a procedural rule provides for the appointment of a special judge upon the recusal of the regular judge, the selection of a special judge by an agreement of the parties is improper.⁴

No particular form or method is necessary by which an agreement for a special judge shall be made,⁵ unless a particular form or method is prescribed by law,⁶ and an agreement for a special judge is not rendered insufficient merely because it is not signed by a party in person⁷ or because it bears no date.⁸ Under some provisions of law, it is essential to a valid agreement that there be mutuality of consent⁹ and that the selection be approved by the regular judge.¹⁰ The agreement selecting the special judge need not be in writing,¹¹ unless a written agreement is required by law,¹² and even when such a requirement applies, a failure to comply does not necessarily deprive the judge of jurisdiction.¹³ Where the parties may validly stipulate to a temporary judge, absent a valid stipulation by the litigants, a temporary judge has no jurisdiction to act, and any actions purportedly taken are therefore void.¹⁴

Generally, such an agreement must be joined in by all parties to the suit,¹⁵ but the parties who appear and take part in litigation may stipulate to the appointment of a temporary judge without the consent of absent, nonlitigating parties.¹⁶ Persons not parties to the agreement, who do not appear and participate in the proceedings, are not bound by the acts of the special judge.¹⁷

Implied acceptance of temporary judge.

A stipulation to trial before a judge pro tem need neither be in writing nor expressly stated but may be implied from the conduct of the parties for purposes of a constitutional provision authorizing such stipulations.¹⁸

Failure to agree.

Under some provisions, on the failure of the parties to agree, it is the duty of the judge before whom the cause is pending to nominate a certain number of competent persons from whom a special judge may be selected;¹⁹ or the regular judge must certify his or her disqualification to the governor, who will appoint the special judge;²⁰ or the clerk of court must certify the fact of disagreement to the clerk of the supreme court, who shall nominate certain persons from whom a special judge may be selected;²¹ or the regular judge may be authorized to transfer the case to another judge.²²

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Footnotes

1 Ark.—[Abercrombie v. Green](#), 235 Ark. 776, 362 S.W.2d 12 (1962).

2 Utah—[State v. McGee](#), 24 Utah 2d 396, 473 P.2d 388 (1970).

Wash.—[State v. McNairy](#), 20 Wash. App. 438, 580 P.2d 650 (Div. 3 1978).

Appointment of temporary judge by stipulation

Cal.—[Gridley v. Gridley](#), 166 Cal. App. 4th 1562, 83 Cal. Rptr. 3d 715 (1st Dist. 2008).

3 Tex.—[Reynolds v. City of Alice](#), 150 S.W.2d 455 (Tex. Civ. App. El Paso 1940).

4 Tex.—[Leininger v. State](#), 674 S.W.2d 868 (Tex. App. Corpus Christi 1984), petition for discretionary review refused, (Mar. 20, 1985).

5 Okla.—[Ex parte Elgan](#), 1912 OK CR 381, 8 Okla. Crim. 75, 126 P. 584 (1912).

6 W. Va.—[Meadow River Lumber Co. v. Smith](#), 121 W. Va. 14, 1 S.E.2d 169 (1939).

7 Tex.—[Cooper v. State](#), 323 S.W.2d 949 (Tex. Crim. App. 1959).

8 Tex.—[Cooper v. State](#), 323 S.W.2d 949 (Tex. Crim. App. 1959).

9 Tex.—[Mims v. State](#), 112 Tex. Crim. 176, 15 S.W.2d 628 (1929).

10 Mo.—[Ex parte Fish](#), 184 S.W. 479 (Mo. Ct. App. 1916).

11 Tex.—[Grogan v. Robinson](#), 8 S.W.2d 571 (Tex. Civ. App. Dallas 1928), writ refused, (Jan. 30, 1929).

12 W. Va.—[Meadow River Lumber Co. v. Smith](#), 121 W. Va. 14, 1 S.E.2d 169 (1939).

13 Cal.—[Gridley v. Gridley](#), 166 Cal. App. 4th 1562, 83 Cal. Rptr. 3d 715 (1st Dist. 2008).

14 Cal.—[Del Real v. City of Riverside](#), 95 Cal. App. 4th 761, 115 Cal. Rptr. 2d 705 (4th Dist. 2002).

15 Tex.—[State v. Gutschke](#), 233 S.W.2d 441 (Tex. Civ. App. San Antonio 1950), judgment rev'd on other grounds, [149 Tex. 292, 233 S.W.2d 446](#) (1950).

16 Cal.—[Reisman v. Shahverdian](#), 153 Cal. App. 3d 1074, 201 Cal. Rptr. 194 (2d Dist. 1984).

Default
One whose default has been duly entered is not a "party litigant" whose stipulation is required.

Cal.—[Barfield v. Superior Court for Los Angeles County](#), 216 Cal. App. 2d 476, 31 Cal. Rptr. 30 (2d Dist. 1963).

17 Cal.—[Toby v. Superior Court in and for Los Angeles County](#), 8 Cal. App. 2d 32, 47 P.2d 338 (2d Dist. 1935).

W. Va.—[Brown v. Miller](#), 103 W. Va. 282, 137 S.E. 227 (1927).

Nonappearing heirs, legatees, and creditors
Cal.—[In re Kent's Estate](#), 6 Cal. 2d 154, 57 P.2d 901 (1936).

18 Cal.—[Gridley v. Gridley](#), 166 Cal. App. 4th 1562, 83 Cal. Rptr. 3d 715 (1st Dist. 2008).

19 Ind.—[Weer v. State](#), 219 Ind. 217, 36 N.E.2d 787 (1941).

20 Tex.—[Clements v. Fort Worth & D.S.P. Ry. Co.](#), 7 S.W.2d 895 (Tex. Civ. App. Amarillo 1928) (disapproved of on other grounds by, [Hubenak v. San Jacinto Gas Transmission Co.](#), 141 S.W.3d 172 (Tex. 2004)).

21 Ind.—[State ex rel. Gentry v. O'Byrne](#), 221 Ind. 282, 46 N.E.2d 687 (1943).

22 Mo.—[State v. De Shon](#), 334 Mo. 862, 68 S.W.2d 805 (1934) (overruled in part on other grounds by, [State v. Williams](#), 337 Mo. 884, 87 S.W.2d 175, 100 A.L.R. 1503 (1935)).